

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**INQUIRY CONCERNING JUDGE
ELAINE M. RUSHING,**

No. 177

**DECISION AND ORDER
IMPOSING PUBLIC CENSURE
PURSUANT TO STIPULATION
(Commission Rule 127)**

I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Elaine M. Rushing, a judge of the Sonoma County Superior Court since 1992. On February 16, 2006, the commission filed its Notice of Formal Proceedings (Notice) against Judge Rushing in which it charges her with misconduct as follows.

Count one charges that on the night of June 21, 2005, Judge Rushing committed the crimes of driving while under the influence of alcohol (DUI) in violation of Vehicle Code section 23152(a), and driving while having 0.08 percent or more, by weight, of alcohol in her blood in violation of section 23152(b) of that code. The first count also charges that following Judge Rushing's plea of no contest to criminal charges based on the drunk driving, she was convicted in Sonoma County Superior Court on August 8, 2005 of violating Vehicle Code section 23152(b) with an enhancement under section 23578 of that code (for a blood alcohol level of 0.20 percent or more).

Count two charges Judge Rushing with a course of dishonest conduct in connection with her efforts to avoid being arrested in connection with the DUI incident of June 21, 2005 after she drove her car into a ditch, following a hit-and-run property

damage collision involving a wall. The dishonest conduct is discussed further in this decision (*post*, pp. 4-5).

Count three relates to the judge's conduct at the scene where she drove her car into the ditch, and later while she was being transported by California Highway Patrol (CHP) officers from that scene. The charges are that Judge Rushing repeatedly invoked her judicial office, and that of her husband (who is an appellate court justice), in an effort to avoid being arrested, and otherwise to receive preferential treatment. The details of the judge's invocation of judicial office also are discussed further in this decision (*post*, pp. 5-7).

The Supreme Court appointed three special masters to hold an evidentiary hearing and to report to the commission. The masters are Hon. Laurence D. Rubin, Associate Justice of the Court of Appeal, Second Appellate District, Division Eight; Hon. Raymond J. Ikola, Associate Justice of the Court of Appeal, Fourth Appellate District, Division Three; and Hon. Suzanne N. Kingsbury, Presiding Judge of the El Dorado County Superior Court. Prior to the masters holding an evidentiary hearing, however, Judge Rushing and her counsel, James A. Murphy, Esq., and the examiner for the commission, Jack Coyle, Esq., (the parties) proposed a stipulated resolution of this inquiry to the commission, as follows.

By an amended Stipulation for Discipline by Consent (Stipulation), executed by the various parties on May 10 and 11, 2006, the parties proposed pursuant to Commission Rule 127(b) that this inquiry concerning Judge Rushing be resolved with Judge Rushing agreeing to the truth of the charges set forth in the Notice, and the imposition of a public censure. According to the terms of the Stipulation, Judge Rushing also agreed that in its decision and order imposing a censure, the commission "may articulate the reasons for its decision" and that she will "accept any such explanatory language that the commission deems appropriate." (Stipulation, p. 1.) Pursuant to the Stipulation, Judge Rushing "waives hearing, review, and any further proceedings." (*Ibid.*)

In connection with the Stipulation, Judge Rushing also executed on May 10, 2006, the requisite Affidavit of Consent (Affidavit) under rule 127(d) in which she admitted the

truth of the charges, consented to the imposition of a censure, and waived all further proceedings and review by the California Supreme Court.

The proposed agreement, consisting of the Stipulation and Affidavit, was presented to the commission on May 11, 2006, which accepted it that day by a vote of 7 to 2. (Further details concerning the commission vote are set forth at the conclusion of this decision, *post*, at page 10.) This Decision and Order, and the findings and conclusions set forth herein, are based on the Stipulation and Affidavit.

II. STIPULATED FACTS AND LEGAL CONCLUSIONS

Count One

On the night of June 21, 2005, in Sonoma County, California, Judge Rushing committed the crimes of driving while under the influence of alcohol in violation of Vehicle Code section 23152(a) and driving while having 0.08 percent or more, by weight, of alcohol in her blood in violation of Vehicle Code section 23152(b). Breath tests revealed blood alcohol levels of 0.19 and 0.21 percent.

On August 8, 2005, upon a plea of no contest in Sonoma County Superior Court case number SCR-469285, Judge Rushing was convicted of violating Vehicle Code section 23152(b) with an enhancement under Vehicle Code section 23578 (for a blood alcohol level of 0.20 percent or more). The charge under Vehicle Code section 23152(a) was dismissed. Judge Rushing was placed on three years of informal probation, ordered to perform 10 days of work release, attend a 45-hour alcohol program, pay a mandatory fine, and comply with other conditions of probation.

Judge Rushing's conduct violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved) and 2A (failing to comply with the law and failing to act in a manner that promotes public confidence in the integrity of the judiciary), and constituted prejudicial misconduct. (See *In the Matter Concerning Alvarez* (Dec. 27, 2005) Decision and Order, p. 2 [DUI found to be prejudicial misconduct].)

By letter dated June 24, 2005, Judge Rushing promptly reported her arrest to the commission as required by canon 3D(3). Upon her conviction, Judge Rushing issued a public apology to the people of Sonoma County in a local newspaper.

Count Two

In an effort to avoid being arrested for crimes related to her drinking and driving referenced in count one, Judge Rushing engaged in a course of dishonest conduct, as follows. While driving under the influence of alcohol on June 21, 2005, Judge Rushing collided with a wall at 5571 Crystal Drive in Santa Rosa, causing property damage. Judge Rushing sustained a minor head injury. She left that scene without notifying law enforcement or the property owners, and continued driving for approximately two miles until she drove her car into a ditch on Riebli Road in Sonoma County.

Judge Rushing remained under the influence of alcohol during the subsequent events of this count and the next. When a passerby stopped her car and asked Judge Rushing if she was all right, Judge Rushing told her to leave. When a second driver stopped and offered to call for help, Judge Rushing said, “we’re fine” (even though she was alone) and told her not to call anyone. Judge Rushing also falsely told the second driver that her husband was with her.

Having been notified by someone other than Judge Rushing, California Highway Patrol (CHP) officers and other emergency personnel arrived at the scene at Riebli Road. When Firefighter Ramos found Judge Rushing sitting in the driver’s seat, Judge Rushing falsely told him that she had not been the driver. She said that an unknown woman had been the driver, and then that an unknown man had been the driver. When Firefighter Ramos asked her where the keys to the car were, Judge Rushing said that the male driver had taken them when he fled the scene up a nearby hill.

When CHP Officer Holeman arrived on the scene as the investigating officer, he asked Judge Rushing what had happened. She falsely told him that she had not been the driver. Judge Rushing said that there had been two other people in the car with her, a man and a woman, and that the man had been driving. She said that she had met them at a friend’s house, but did not know their names. She said that she had been sitting in the

back seat (even though the car had no back seat). When Officer Holeman asked Judge Rushing where the keys to the car were, she first told him that she thought they were in the car, then said that the male driver had taken the keys with him when he and the woman left the scene on foot, walking back toward the friend's house. She said that she had let the man drive her car because he and the woman were going to give her a ride home and then drive her car back to the friend's house. When Officer Holeman asked Judge Rushing how much alcohol she had consumed, she first answered "two bottles," then said, "two glasses." When the officer asked Judge Rushing what she had been drinking, she asked him why he was asking and again asserted that she had not been driving the car.

Judge Rushing's conduct violated canons 1 and 2A (failing to act at all times in a manner that promotes public confidence in the integrity of the judiciary), and constituted prejudicial misconduct. (See *Inquiry Concerning McGraw*, No. 169 (Apr. 3, 2003) Decision and Order, p. 5 [false and misleading statements to media by judge not acting in judicial capacity found to be prejudicial misconduct].)

Count Three

At the scene on Riebli Road, referenced in count two, and while being transported from that scene, Judge Rushing repeatedly invoked her judicial office, and that of her husband, in an effort to avoid being arrested for crimes related to her drinking and driving and to otherwise receive preferential treatment, as follows.

Judge Rushing identified herself to Firefighter Ramos by showing him her Sonoma County Court Judge identification badge. When Judge Rushing was asserting her false story that she was not the driver to Officer Holeman, she repeatedly told him that she was a superior court judge in Sonoma County. She also repeatedly requested that Officer Holeman call her husband who, she informed the officer, was an appellate court justice.

When Officer Holeman told Judge Rushing that he had determined that she had in fact been the driver, and that he needed her to answer some questions and perform some field sobriety tests, she responded to the effect of, "but I'm a judge, and I told you I

wasn't the driver." She then declined to answer any more questions and declined to perform any field sobriety tests.

When Officer Holeman placed Judge Rushing under arrest for driving under the influence, she persisted in telling him that she was a superior court judge. She told him that because she was a judge he should not be arresting her. She also repeatedly requested that he call her husband, the appellate court justice.

When Judge Rushing was handcuffed and placed in a patrol vehicle, she began complaining about the handcuffs and asked Officer Holeman if he had seen her superior court judge identification badge. She asked him if he knew she was a judge. She told him that he did not need to be doing what he was doing and that he could remove the handcuffs. Officer Holeman explained that they could not be removed, pursuant to CHP policy. Judge Rushing then said that the handcuffs were too tight. Officer Holeman helped her out of the car, checked the handcuffs himself and had another CHP officer check them to confirm that they were not too tight and had been placed on her in a manner consistent with CHP policy.

Judge Rushing was helped back into the car, and when Officer Holeman was transporting her to a CHP office, she repeatedly told him that he should remove the handcuffs. Officer Holeman again advised her that he could not do so, pursuant to CHP policy. Judge Rushing then told Officer Holeman that in her courtroom she goes against court policies for CHP and other officers, and that he should extend that courtesy to her. She persisted in telling Officer Holeman that she was a superior court judge and that her husband was an appellate court justice.

Judge Rushing's conduct violated canons 1, 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and 2B(2) (lending prestige of judicial office to advance personal interests); see commentary to canon 2B(2), stating that judge must not use position to gain preferential treatment when stopped by a police officer. Because Judge Rushing was not acting in a judicial capacity when she attempted to obtain preferential treatment, she committed

prejudicial, rather than willful misconduct. (See *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 317-319 (*Kennick*).)

Other Factors Relevant To Discipline

Judge Rushing has no prior discipline. Numerous people, primarily from the legal community, have submitted letters in support of Judge Rushing's remaining in judicial office.

III. DISCIPLINE

The starting point of our analysis concerning the appropriate level of discipline is the Supreme Court's admonition that the purpose of judicial discipline "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112 (*Broadman*), citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.)

Based on Supreme Court decisions, the commission has identified several factors that are relevant to determining appropriate discipline in furtherance of the foregoing overall disciplinary objectives enunciated in *Broadman*. (Decision and Order Removing Judge Ross from Office, Inq. 174 (2005), p. 64.) As relevant here, the factors include the number and nature of the acts of misconduct; the existence of prior discipline; whether the judge appreciates that he or she committed misconduct; the judge's general integrity; the likelihood of future misconduct; the impact of the misconduct on the judicial system; and the judge's veracity. In many respects, the various considerations overlap one another. Applying these standards here, we are satisfied that the stipulated censure is the appropriate level of discipline.

The number of acts of misconduct is relevant to the question of discipline, but not according to any rigid formula. (*Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307.)

The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct

establishing “lack of temperament and ability to perform judicial functions in an even-handed manner.” [Citation.]

(*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918, quoting from *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.)

Judge Rushing admits she committed three instances of prejudicial misconduct. Prejudicial misconduct, committed outside of a judge’s official capacity may be the basis for removal or censure (Cal. Const., art. VI, §18, subd. (d)), but is generally considered less serious than willful misconduct in office. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284.)

There is no indication of any pattern of behavior similar to that charged in the Notice, or of any lack of judicial temperament. Nonetheless, Judge Rushing’s DUI, as well as the hit-and-run property damage incident involving the wall, and her resulting criminal conviction are utterly irreconcilable with minimum standards expected of a judge, and as stipulated (see *ante*, p. 5) with the requirements of canons 1 and 2A.

Judge Rushing’s conduct following her attempts to drive while drunk is particularly egregious. Falsifying stories to persons seeking to offer early assistance, and to emergency personnel and the arresting CHP officers reflects poorly on Judge Rushing’s integrity and without doubt seriously negatively impacts the public perception of her, and of the judiciary in general. Judge Rushing left the scene after colliding with a residential wall, lied to citizens offering her initial assistance, and provided a fabricated story to emergency personnel and the investigating officers that she was not the driver. None of this behavior can be reconciled with either canon 1 or 2A or with the standard set by the Supreme Court in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865, that honesty is a “minimum qualification” expected of every judge.

Judge Rushing also repeatedly invoked her judicial office and that of her husband in an effort to avoid arrest and otherwise receive preferential treatment. She stipulates (see *ante*, pp. 6-7) that her conduct in this regard is inconsistent with canons 1, 2A, and 2B(2). In the *Kennick* case, the Supreme Court found Judge Kennick’s attempts to invoke the prestige of office as a basis for receiving preferential treatment from the California

Highway Patrol the day after his arrest for drunk driving to be “reprehensible.” (*Kennick, supra*, 50 Cal.3d. at p. 340.) The commission views Judge Rushing’s comparable behavior similarly.

Although Judge Rushing’s overall conduct here is seriously at odds with the canons and expected judicial behavior, the commission recognizes that all three instances of wrongdoing arose out of one drunken lapse of judgment to get behind the wheel of her car. However, that lapse is no more excusable here than when anyone else makes a similar mistake while under the influence.

Judge Rushing’s veracity and integrity have been seriously impugned. Her attempts to obtain preferential treatment, however, were unsuccessful. There was no on-bench misconduct and there was no direct adverse affect on the administration of justice per se. Several people, primarily from the legal community, have submitted letters in support of Judge Rushing remaining in judicial office.

In assessing the likelihood of whether Judge Rushing will commit future misconduct, the commission has taken into consideration the judge’s assurance to the commission that she has modified her behavior to ensure she will not reoffend. She has no prior history of any alcohol-related offenses or misconduct, and she has no prior discipline by the commission during more than 14 years on the bench. The judge promptly acknowledged to the public and to the commission the serious nature of, and her expressions of remorse over, her wrongdoing. Finally, Judge Rushing has stipulated to the imposition of this serious discipline as the appropriate sanction that is commensurate with her admitted serious wrongdoing.

Based on the foregoing analysis and appraisal of Judge Rushing’s wrongdoing, the commission concludes the misconduct here does not rise to the level of wrongdoing in which the Supreme Court has imposed the ultimate sanction of removal from office. The commission also concludes that the purposes of judicial discipline as enunciated in *Broadman* – protection of the public, enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of

the judicial system – can be accomplished through a censure. Accordingly, the commission hereby imposes this public censure of Judge Rushing.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Ms. Patricia Miller, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted to accept the parties’ settlement proposal and to issue this decision and order imposing a public censure pursuant to the stipulated agreement. Commission members Mr. Michael A. Kahn and Mr. Jose Miramontes voted to reject the proposed settlement, and dissent from this decision and order imposing the public censure, on the ground that the public interest would be better served if the matter were decided after the development of a full factual record following a hearing before the special masters. Commission member Justice Judith D. McConnell is recused, and commission member Mrs. Crystal Lui did not participate in this matter.

Dated: June 8, 2006

/s/
Marshall B. Grossman
Chairperson